IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT BURKE	:	CIVIL ACTION
Plaintiff	:	NO. 96-3249
	:	
v.	:	
	:	
UNITED STATES OF AMERICA	:	CRIMINAL ACTION
Defendant	:	NO. 92-268-1

MEMORANDUM AND ORDER

YOHN, J. November , 1999

A jury found Robert Burke guilty of the murder of Donna Willard, a federal witness, and of related charges on August 26, 1993. On December 1, 1993, Burke was sentenced to life in prison, as well as to terms of 60 and 120 months running concurrently with his life sentence. Burke appealed his conviction and sentence to the Third Circuit, which affirmed on July 20, 1994. The Supreme Court denied his petition for certiorari on January 17, 1995. Burke then filed a motion under 28 U.S.C. § 2255 on April 25, 1996, challenging his conviction and sentence. The court denied Burke's § 2255 motion on November 8, 1996, and the Third Circuit affirmed on November 19, 1997.[1]

Burke has now filed an Independent Action for Relief from the Judgment in a Criminal Case or, in the Alternative for Relief from the Order Denying the Section 2255 Motion (Doc. No.

[1]Burke was represented by A. Charles Peruto, Sr., at trial, James West of Sprague & Sprague on his appeal, and David Foster of Costopoulos, Foster & Fields on his § 2255 motion.

160) ["Independent Action"].[2] He states as grounds for relief the perpetration of fraud on the court and the constructive denial of counsel. Upon consideration of Burke's Independent Action, the government's Response to Petitioner's Action for Relief from Judgment in a Criminal Case or, in the Alternative, for Relief from the Order Denying the Section 2255 Motion (Doc. No. 162) ["U.S. Response"], and Burke's Response to Government's Opposition to his *Hazel-Atlas* Motion (Doc. No. 163) ["Burke Reply"], the court will dismiss Burke's Independent Action for the following reasons: (1) the Independent Action is the functional equivalent of a second § 2255 motion and, as such, is prohibited by the restrictions on successive habeas petitions of the Antiterrorism and Effective Death Penalty Act ["AEDPA"] in 28 U.S.C. §§ 2244 and 2255; and (2) even if the court were able to consider Burke's claims, these claims are meritless because Burke has shown neither that his failure to assert these claims in his first § 2255 motion was anything other than mere negligence on his part nor that dismissal of his Independent Action would be a grave miscarriage of justice.

I. Legal Standard

[2]Despite the fact that Burke styles his submission an "Independent Action," he submitted it under the same case number as his previous § 2255 motion and has written it in the form of a motion and not as a complaint in a new action. I will consider it as an independent action, the government's response as a motion to dismiss that action, and Burke's reply as a response to what will be considered the government's motion to dismiss. *See* Wright et al., *Federal Prac. & Proc.: Civil 2d* § 2868 (1995) ("A motion may be treated as an independent action or vice versa as is appropriate.").

A. Antiterrorism and Effective Death Penalty Act

AEDPA amended 28 U.S.C. §§ 2244 and 2255 to prohibit the filing of second or successive habeas petitions under § 2255 absent certification by a panel of the appropriate court of appeals either that new evidence was discovered or that a new rule of constitutional law was announced that was made retroactive to cases on collateral review to the Supreme Court. *See* 28 U.S.C. §§ 2244(a), 2255. Although AEDPA on its face restricts only successive habeas petitions, other petitions for post-conviction relief have frequently been recognized to be the functional equivalent of successive habeas petitions such that AEDPA's restrictions would apply. *See United States v. Rich*, 141 F.3d 550, 553 (5th Cir. 1998) (treating a Federal Rule of Civil Procedure 60(b) post-conviction challenge as a successive habeas petition and upholding the denial of the challenge for failure to comply with AEDPA), *cert. denied*, 119 S. Ct. 1156 (1999); *In re Medina*, 109 F.3d 1556, 1561 (11th Cir. 1997) (considering a Rule 60(b) motion for relief from judgment to be a successive habeas motion), *cert. denied by Medina v. Singletary*, 520 U.S. 1151 (1997); *McQueen v. Scroggy*, 99 F.3d 1302, 1335 (6th Cir. 1996) (same); *Hunt v. Nuth*, 57 F.3d 1327, 1339 (4th Cir. 1995) (same); *Booker v. Dugger*, 825 F.2d 281, 284-85 n.7 (11th Cir. 1987) (recognizing that "the abuse of writ standard [that is] applied to successive [habeas] writs . . . may properly be superimposed on this independent action" brought under Rule 60(b)); *Dietsch v. United States*, 2 F. Supp. 2d 627, 634 (D.N.J. 1998) (applying the successive habeas restrictions in AEDPA to a Rule 60(b) motion); *see also Felker v. Turpin*, 101 F.3d 657, 661 (11th Cir. 1996) (approvingly citing *Booker* and quoting from the *Booker* court's explanation that Rule 60(b) independent actions are subject to the restrictions on successive habeas motions); *Neely v. United States*, 546 F.2d 1059, 1066 (3d Cir. 1976) (recognizing that a Rule 60(b)

independent action is "most analogous to a proceeding under 28 U.S.C. § 2255"). For this reason, the restrictions on successive habeas petitions that were standardized by AEDPA will be applied to Burke's Rule 60(b) Independent Action.

B. Independent Action

An independent action for relief from a judgment or order, filed under Federal Rule of Civil Procedure 60(b), is the appropriate vehicle for challenging, on the basis of fraud committed on the court or other equitable considerations, that judgment or order after the expiration of the strict one year time limit on Rule 60(b)(3) motions. *See United States v. Beggerly*, 118 S. Ct. 1862, 1867 (1998); *Neely*, 546 F.2d at 1065-66 (allowing the use of a Rule 60(b) independent action to challenge the plaintiff's conviction and sentence in a criminal trial); *Fed. R. Civ. P.* 60(b). Rule 60(b) reads, in part, as follows:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party . . . . The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. . . . This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court.

Id. The Supreme Court of the United States has, however, interpreted Rule 60(b) to require that relief be granted in such independent actions "only to prevent a grave miscarriage of justice." *Beggerly*, 118 S. Ct. at 1868. As an example of a case that rises to the level of a grave miscarriage of justice, the *Beggerly* Court described a situation in which the wrong occurred

"'without negligence, laches or other fault upon the part of the petitioner,'" *id.* (quoting *Marshall v. Holmes*, 141 U.S. 589, 596 (1891)), implicitly acknowledging that lower courts require lack of fault or negligence on the part of the claimant when considering independent actions. *See Campaniello Imports, Ltd. v. Saporiti Italia S.p.A.*, 117 F.3d 655, 662 (2d Cir. 1997); *Booker v. Dugger*, 825 F.2d 281, 284 (11th Cir. 1987); *Winfield Assocs. Inc. v. Stonecipher*, 429 F.2d 1087, 1090 (10th Cir. 1970). As the Eleventh Circuit noted in *Booker*, "[w]here complainant's own negligence or oversight, however innocent, contributed to the original judgment, an independent action for relief is not proper unless the evidence which would establish injustice is 'practically conclusive.'" *Booker*, 825 F.2d at 284 (quoting *Johnson Waste Materials v. Marshall*, 611 F.2d 593, 595 (5th Cir. 1980)). The rule stated in *Booker* is well-conceived and will be applied in this case.

II. Discussion

A. Burke's Independent Action as a Successive Habeas Petition

Because Burke's Independent Action is based on allegations of fraud on the court and constructive denial of counsel in his criminal trial, the court considers it to be the functional equivalent of a habeas petition. *See* cases cited *supra* Part I.A. Because Burke has already filed one habeas petition and had it denied, *see Burke v. United States*, No. CIV. A. 96-3249, 1996 WL 648452 (E.D. Pa. Nov. 8, 1996), the court considers Burke's Independent Action to be a second habeas petition. Sections 2244 and 2255 prohibit the filing of second or successive habeas petitions absent certification by the appropriate court of appeals either that new evidence was discovered or that a new rule of constitutional law was announced that was made retroactive

to cases on collateral review to the Supreme Court. *See* 28 U.S.C. §§ 2244(a), 2255. Therefore, the court will dismiss Burke's Independent Action with prejudice as required by 28 U.S.C. §§ 2244 and 2255 because it has not been certified by the Third Circuit to be based on newly discovered evidence or a new rule of constitutional law.[3]

B. The Merits of Burke's Claims

Even if Burke's Independent Action were not barred by the restrictions on successive habeas petitions in §§ 2244 and 2255, his claims of fraud on the court and constructive denial of counsel would fail on the merits.

1. The Perpetration of Fraud on the Court by the Prosecution

Burke raises three bases for his claims that the prosecution defrauded the court: (1) the prosecution told the jury that the government would recommend a sentence of twenty-five years for a cooperating witness, James David Louie, when, in fact, it "recommended" a sentence of less than twenty-five years; (2) the prosecution failed to play an answering machine tape that called into question the prosecution's contention that Louie was afraid of Burke; and (3) the prosecution "corrected" inconsistencies in Louie's testimony concerning the location of an ATM withdrawal.[4]

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[3]Even if Burke submitted his Independent Action to the Third Circuit, the court doubts that the Third Circuit would certify that it was based on newly discovered evidence or a new rule of constitutional law as neither is alleged by Burke.

[4]Burke also mentions that the prosecution had only one corroborating witness besides Louie, James Gray, and that Gray was not a credible witness. *See* Independent Action at 14-15. Burke does not, however, allege that Gray's testimony defrauded the court. Even if Burke had made such an allegation, this allegation would go to Gray's credibility and the weight that his testimony should have been given, not to the perpetration of fraud on the court. *See id*. at 14-15. This is not the stuff of a grave miscarriage of justice, if it is injustice at all.

See Independent Action at 12-14. Burke makes no showing, however, that his failure to assert his claims of fraud on the court in his earlier § 2255 motion was not mere negligence on his part.

All facts giving rise to Burke's fraud on the court claims were clearly available to Burke on April 25, 1996, when he filed his § 2255 motion. The Louie sentencing, the basis of the first fraud claim, occurred on September 12, 1994, seventeen months before Burke's § 2255 motion was filed. Further, the facts giving rise to the second and third bases for Burke's fraud claims occurred at his trial in 1993 and, thus, were certainly available to Burke when he filed his § 2255 motion in 1996. Thus, because Burke makes no showing that his failure to assert his fraud on the court claims in his § 2255 motion was due to anything but his negligence, these claims must be dismissed unless the evidence establishing injustice is practically conclusive. *See Booker*, 825 F.2d at 284. The evidence supporting Burke's claims of injustice, though, is far from practically conclusive.

Burke argues that the prosecution's statement to the jury that it would recommend a sentence of twenty-five years for Louie was fraudulent because it intended to, and did, recommend a sentence of less than twenty-five years, resulting in a sentence of twenty years. *See* Independent Action at 12-13. In fact, the government admits that it filed a motion under section 5K1.1 of the Sentencing Guidelines authorizing the court to impose a sentence of less than twenty-five years on Louie. *See* U.S. Response at 6. Although the government's motion authorized a sentence of less than twenty-five years for Louie, the government did not actually recommend a sentence of less than twenty-five years, as Burke's Independent Action points out. *See* Independent Action at 13 (admitting that in the section 5K1.1 motion the government "'maintain[ed] its twenty-five year recommendation'"). Moreover, even if this authorization

could be interpreted as a "recommendation," there is no evidence of the falsity of the government's statement at the time it was made (i.e., whether the government intended to authorize less than twenty-five years *at the time* it made the statement that it intended to recommend twenty-five years). *See United States ex rel. Lamers v. City of Green Bay*, 998 F. Supp. 971, 987 (E.D. Wisc. 1998) (noting that a promise to perform is not false unless the intent not to perform existed at the time the promise was made), *aff'd*, 168 F.3d 1013 (7th Cir. 1999). Further, even if Burke had offered practically conclusive evidence that the government deliberately told the jury that it would recommend twenty-five years when it knew it would authorize a sentence of less than twenty-five years, the court holds that such an act would not meet the grave miscarriage of justice standard required by the Court in *Beggerly*. *See Beggerly*, 118 S. Ct. at 1868. In view of the many means used by Burke's trial attorney to attack Louie's credibility,[5] if the jury had known that Louie would be sentenced only to twenty years instead of

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[5]In considering Burke's § 2255 motion, I noted Louie's impeachment at trial by Burke's attorney in the following ways:

1. Louie's own fraudulent schemes with Burke;
2. Louie's own independent motive to sabotage the government's fraud investigation;
3. Louie's entry into and breach of a fraud-related plea agreement with the government and the large number of crimes for which the agreement provided him immunity from prosecution;
4. Louie's prior inconsistent statements;
5. Louie's commission of crimes while he was cooperating with the government;
6. Louie's failure to disclose his knowledge of various drug-related activities to the authorities;
7. Louie's exculpatory comments (about Burke) to Foley;
8. Louie's entry into a murder related plea agreement and his desire to avoid the death penalty;
9. Louie's pattern of criminal activity;
10. Louie's involvement in a beating and robbery incident;
11. Louie's participation in arson separate from his association with Burke;
12. Louie's legitimate position as a courier, which he used as an opportunity to "case"

twenty-five, any change in the jury's opinion of Louie's credibility would have been of a de minimis nature.

The second basis for Burke's charge of fraud on the court is the prosecution's failure to play an answering machine tape that would have challenged the prosecution's theory that Louie was afraid of Burke. *See* Independent Action at 13. The failure to play this recording was already the subject of Burke's § 2255 motion in the form of a claim of ineffective assistance of counsel, and my memorandum on that motion makes it clear that failure to introduce the tape certainly did not operate as a grave miscarriage of justice. In ruling on Burke's § 2255 motion, I held that the recording was, at best, cumulative of other evidence available to show animosity between Louie and Burke and that introduction of the recording would not have changed the outcome of the trial. *See Burke*, 1996 WL 648452, at *5-6. Thus, even if Burke offered practically conclusive evidence that the prosecution's failure to play this tape constituted fraud on the court, which he does not, such fraud would not have been a grave miscarriage of justice.

As the third basis for Burke's fraud charge, he claims that in closing arguments the prosecution "corrected" inconsistencies in Louie's testimony concerning an ATM withdrawal.[6]

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buildings for later robbery;

13. Louie's admission that he tried to find and to murder other potential adverse witnesses in the fraud case;
14. Louie's own participation in the murder of Donna Willard;
15. Louie's admissions that he continually lied to the government or "blew smoke" for his own ends.

Burke, 1996 WL 648452, at *5-6 (citations and footnotes omitted).

[6]Burke quotes the following passage from the prosecutor's closing arguments:

> Louie tells you that he got $500 when he met with Mr. Burke Monday 6:00 in the evening. What did the MAC withdrawal records tell U.S.? It's a little confusing to read the statements and the withdrawal information together but it's clear that the withdrawal was Monday afternoon but it was in New Jersey [not on Spring

See Independent Action at 14. Based on my reading of the excerpts of the prosecutor's closing arguments contained in Burke's Independent Action, the prosecutor is not correcting any inconsistencies. In fact, he seems to be pointing them out. Of course, he does try to minimize the significance of the inconsistencies in Louie's testimony, but Burke makes no effort to explain why such inconsistencies were significant. Consequently, I hold that the evidence of fraud concerning Louie's ATM testimony is neither practically conclusive nor at all persuasive.

In addition to the reasons already discussed in Part II.A, because all three bases for Burke's fraud on the court claims were available to Burke when he filed his § 2255 motion and he apparently failed to include them in that motion at least negligently, if not willfully, *see Booker*, 825 F.2d at 284, because the evidence of fraud is by no means practically conclusive, *see id*., and because all of Burke's allegations of fraud, even if true, would not represent a grave miscarriage of justice, *see Beggerly*, 118 S. Ct. at 1868, I will dismiss the claims of fraud on the court in Burke's Independent Action.

2. The Constructive Denial of Counsel Due to Prosecutorial Misconduct

Burke raises two bases for his claims that he was constructively denied counsel[7] due to prosecutorial misconduct, both of which originate in the jury instructions: (1) the RICO enterprise instruction incorrectly collapsed the enterprise element and the pattern of racketeering

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> Garden] before Mr. Burke came to meet Louie.
>
> So, Louie says he gave me $500 from a MAC machine Monday around 6:00 and the fact is that Mr. Mr. [sic] Burke had already gotten the $500 an hour or so earlier before he met with Louie and gave him the money.

Independent Action at 14 (quoting Aug. 25, 1993, Trial Transcript at 55-56).

[7]Burke never makes clear his theory of how faulty jury instructions constructively denied him counsel, but his claims fail for other reasons, so I need not address this issue.

activity element of a RICO violation, and (2) the reasonable doubt instruction incorrectly contained a two inference explanation of reasonable doubt. *See* Independent Action at 19. Again, Burke makes no showing that his failure to complain about constructive denial of counsel in his § 2255 motion was anything other than negligence on his part, especially because his § 2255 motion was based on claims of ineffective assistance of counsel. As a result, these claims are barred absent practically conclusive evidence of injustice. There is no evidence of any injustice, however, because these two jury instructions were not faulty.

If a criminal defendant is denied counsel at a critical stage in his proceeding, or if his counsel does not "subject the prosecution's case to meaningful adversarial testing," then there has been a denial of his Sixth Amendment right to counsel. *United States v. Cronic*, 466 U.S. 648, 659 (1984). As Burke notes in his Independent Action, "'[a] constructive denial of counsel occurs . . . in only a *very narrow spectrum of cases* where the circumstances leading to counsel's ineffectiveness are so egregious that the defendant was in effect denied any meaningful assistance at all.'" Independent Action at 18 (quoting *Childress v. Johnson*, 103 F.3d 1221, 1229 (5th Cir. 1997) (internal quotation marks and citations omitted)) (emphasis added); *see also Hull v. Kyler*, 190 F.3d 88, 112 (3d Cir. 1999) (holding that counsel's conduct in agreeing that his client was competent to stand trial despite strong evidence to the contrary amounted to a constructive denial of counsel). Unlike claims of constructive denial of counsel, claims of ineffective assistance of counsel are cognizable in the broader spectrum of cases in which, although counsel may have been present and helpful, "'counsel . . . unwittingly relieved the government of its burden of proof.'" Independent Action at 18 (quoting *United States v. Glover*, 97 F.3d 1345, 1349 (10th Cir. 1996)); *see also Hull*, 190 F.3d at 112 (discussing ineffective

assistance of counsel). Thus, a constructive denial of counsel occurs in those rare cases in which the ineffective assistance of counsel is "so deficient as to effectively constitute a denial of the right to counsel." *Hull*, 190 F.3d at 112.

In ruling on Burke's first § 2255 motion, the court held that Burke did not suffer the ineffective assistance of counsel at his trial. *See Burke*, 1996 WL 648452, at *1. Thus, the court considers it extremely unlikely, if not impossible, that although Burke's counsel's assistance was not ineffective, it was "so deficient as to effectively constitute a denial of the right to counsel." *Hull*, 190 F.3d at 112.

Burke claims that the following jury instruction is an incorrect statement of the law and amounted to a constructive denial of counsel: "the function of overseeing and coordinating the commission of various offenses and other activities, if proved, satisfies [the Enterprise] requirement." Independent Action at 19 (quoting Aug. 25, 1993, Trial Transcript at 150). He argues that this instruction incorrectly collapses the separate and distinct enterprise and pattern of racketeering activity elements of a RICO violation. *See id.* (citing *United States v. Turkette*, 452 U.S. 576, 583 (1981), to support the necessity of proving each element separately). As with Burke's other claims, he should have previously raised this claim, and his failure to do so is fatal to his claim absent practically conclusive evidence of injustice. Not only is there no practically conclusive evidence of injustice, there is no evidence whatsoever of any injustice stemming from this instruction.

This instruction does not collapse the elements but points out the additional requirement of an enterprise: the enterprise must perform the function of not only overseeing the "various offenses" that constitute the pattern of racketeering activity but also overseeing "other activities"

not necessarily related to the offenses. Additionally, immediately before hearing the excerpted portion of the jury instruction on which Burke bases his claim, the jury was told of the necessity of finding that "'the enterprise had an existence separate and apart from the pattern of racketeering activity in which the indictment charges it engaged.'" U.S. Response at 8 (quoting Aug. 25, 1993, Trial Transcript at 150). Thus, the jury instruction concerning the enterprise element of a RICO violation was not faulty and could not have given rise to any injustice. Further, because there was no injustice, Burke's counsel cannot be said to have been ineffective, and certainly not so ineffective that Burke was effectively denied all assistance of counsel. *See Hull*, 190 F.3d at 112. Therefore, Burke was not constructively denied assistance of counsel as he claims.

Burke also argues that the trial judge misrepresented the threshold of reasonable doubt when he instructed the jury that reasonable doubt was present if the evidence reasonably permitted conclusions of both guilt and innocence. *See* Independent Action at 19 (citing Aug. 25, 1993, Trial Transcript at 140). The claim that this two inference instruction was faulty should have been raised earlier, too, and Burke makes no effort to explain why his failure to do so is due to anything but his negligence. Because evidence of any injustice stemming from this claim is nonexistent, much less practically conclusive, the claim must fail.

In order to support his claim that the jury was improperly instructed on reasonable doubt, Burke cites *United States v. Jacobs*, 44 F.3d 1219, 1226 (3d Cir. 1995), *cert. denied*, 514 U.S. 1101 (1995), which was decided by the Third Circuit seventeen months after his conviction. At the time Burke was convicted and at the time *Jacobs* was decided, the two inference instruction was part of the standard charge on reasonable doubt in Edward Devitt et al., *Federal Jury*

Practice & Instructions (1992). *See id*. In *Jacobs*, the Third Circuit made clear that the two inference instruction was not plain error and that any tendency of the two inference instruction to mislead a jury as to the meaning of reasonable doubt was not a strong one. *See id*. at 1226. In order to deal with the potential for the two inference instruction to mislead a jury, the Third Circuit suggested that trial judges should heed criticism of the instruction "when it is specifically brought to the attention of trial judges in future cases." *Id.* Because *Jacobs* was decided after Burke's trial, the Third Circuit's suggestion that trial judges heed criticism of the two inference instruction in future cases would not apply to Burke's criminal trial. Even if it did apply, Burke has not made any allegations that he "specifically brought to the attention" of the trial judge the potentially problematic nature of the two inference instruction. Hence, there is no evidence, much less practically conclusive evidence, of injustice due to this instruction and, thus, no reason not to hold Burke accountable for his failure to raise this claim before now. Again, because there was no injustice, Burke's counsel was not rendered ineffective by this instruction, much less so ineffective that Burke was denied his right to counsel. *See Hull*, 190 F.3d at 112. Therefore, Burke was not constructively denied assistance of counsel as he claims.

In addition to the reasons already discussed in Part II.A, because Burke apparently failed to raise these claims at an earlier time due to his negligence, *see Booker*, 825 F.2d at 284, and because there is no evidence of any injustice arising out of these claims, *see id*., I will dismiss the claims of constructive denial of counsel in Burke's Independent Action.

III. Conclusion

Because Burke's Independent Action is the functional equivalent of a successive habeas petition and, as such, is barred by AEDPA absent certification by the Third Circuit; and because even if consideration of his Independent Action were not prohibited by AEDPA, Burke has not shown either that his failure to raise his fraud on the court and constructive denial of counsel claims before now was due to anything other than his negligence or that dismissal of his Independent Action would be a grave miscarriage of justice, I will dismiss his Independent Action with prejudice. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT BURKE	:	CIVIL ACTION
Plaintiff	:	NO. 96-3249
	:	
v.	:	
	:	
UNITED STATES OF AMERICA	:	CRIMINAL ACTION
Defendant	:	NO. 92-268-1

ORDER

YOHN, J. November , 1999

AND NOW, this day of November, 1999, upon consideration of plaintiff Robert Burke's Independent Action (Doc. No. 160), the U.S. Response (Doc. No. 162), and the Burke Reply (Doc. No. 163), IT IS HEREBY ORDERED and DECREED that the Independent Action is DISMISSED WITH PREJUDICE.

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William H. Yohn, Jr.